

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2017] NZREADT 60**

**READT 022/17**

IN THE MATTER OF

An Appeal under Section 111 of the Real  
Estate Agents Act 2008

BETWEEN

ALICE WOUTERS  
Appellant

AND

THE REAL ESTATE AGENTS  
AUTHORITY (CAC 412)  
First Respondent

AND

THOMAS RICHARDSON  
Second Respondent

On the papers

Tribunal:

Hon P J Andrews (Chairperson)  
Mr G Denley (Member)  
Ms N Dangen (Member)

Submissions received from:

Ms Wouters  
Ms Garrick, on behalf of the Authority  
Mr Richardson

Date of Ruling:

9 October 2017

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**RULING OF THE TRIBUNAL**  
**(Applications to admit further evidence and to cross-examine witnesses)**

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## **Introduction**

[1] Ms Wouters has appealed pursuant to s 111 of the Real Estate Agents Act 2008 (“the Act”) against the decision of Complaints Assessment Committee 412 (“the Committee”), dated 22 May 2017, in which the Committee decided to take no further action in respect of her complaint against Mr Richardson.<sup>1</sup> The appeal is scheduled for hearing in Dunedin on 21 November 2017.

[2] Both Ms Wouters and Mr Richardson have applied for leave for further documents to be admitted at the Tribunal hearing. Mr Richardson has also applied for leave to cross-examine Ms Wouters, her husband, and “other parties called by Appellant (if any)”.

## **Background**

[3] Ms Wouters and her husband, Mr Rietveld, bought a house on two hectares of land that was intended to be subdivided from a larger block of land at Halfway Bush, near Dunedin (“the property”) in May 2012. Mr Richardson was the salesperson marketing the property.<sup>2</sup> He was also a director of the vendor company, RPR Properties Ltd (“RPR”).

[4] In February 2013, RPR was granted resource consent to subdivide the land remaining after subdivision of Ms Wouters’ lot (“the balance land”) into nine lots. In June 2015 (following the release by the Dunedin City Council (“the Council”) of proposed zone changes), RPR applied for resource consent to create 34 lots. That application has been opposed by Ms Wouters and other residents in the area.

## **The Complaint**

[5] Ms Wouters alleged that Mr Richardson had:

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<sup>1</sup> Complaint No. C15274, re Thomas Richardson, Decision to take no further action, 22 May 2017.

<sup>2</sup> Mr Richardson voluntarily surrendered his salesperson’s licence in March 2016.

- [a] not made written disclosure of his interest in the transaction as vendor (as is required by ss 134–137 of the Act);
- [b] misrepresented to her that the balance land would be subdivided into nine lots, each of two hectares;
- [c] lied at resource consent hearings by saying that she was aware of the intention to subdivide the balance land into smaller lots;
- [d] misrepresented to her the ownership of an undeveloped road along one boundary of the property, onto which sheds on the property encroached; and
- [e] published the sale and purchase agreement for the property without her permission.

[6] Mr Richardson denied the allegations. He said that at the time of the sale to Ms Wouters there was no requirement for written disclosure,<sup>3</sup> he had not misrepresented the number of lots to be developed, had not lied at the resource consent hearing, Ms Wouters was fully aware of the issues relating to the road, and that the Council had published the sale and purchase agreement after he had provided it, as part of the resource consent process.

### **The Committee's decision**

[7] The Committee's reasons for deciding to take no further action on Ms Wouters' complaint may be summarised as follows:

- [a] While rejecting Mr Richardson's submission that he was not required to give disclosure of his interest in the transaction, the Committee found that Ms Wouters knew that Mr Richardson was the director of RPR. It also found that although there was no written disclosure, there was oral disclosure, Mr Richardson had signed the sale and purchase agreement as

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<sup>3</sup> This was clearly incorrect, as the Act had been in force since 17 November 2009, approximately two years and six months before Ms Wouters' purchase.

director of RPR, and there was no suggestion that the position would have been different had there had been written disclosure.

- [b] Ms Wouters expected the balance land to be developed into rural lifestyle blocks, and Mr Richardson could not have predicted the outcome of his applications for resource consent. The Committee was not satisfied that Mr Richardson had misled Ms Wouters.
- [c] Mr Richardson's statements at a resource consent hearing were made in his capacity as director of RPR, not as a licensee in the course of real estate agency work.
- [d] Mr Richardson had not misled Ms Wouters concerning the road.
- [e] Mr Richardson had provided the sale and purchase agreement in the course of the resource consent process in his capacity as director of RPR and not as a licensee, and it would be unreasonable if the fact that he was a licensee prevented him from doing something he would otherwise be able to do.

### **The appeal**

[8] Ms Wouters challenges the Committee's findings as to Mr Richardson's disclosure of future subdivision of the balance land, and his statements at a resource consent hearing. Her notice of appeal does not refer to the Committee's findings concerning the issues of Mr Richardson's disclosure under ss 134 to 137 of the Act, representations concerning the road, and disclosure of the sale and purchase agreement.

### **Principles as to applications to adduce further evidence and to cross-examine parties and/or other persons**

[9] The relevant considerations were set out at paragraphs [2] to [4] of the Tribunal's Directions Minute of 18 August 2017. Section 111(3) of the Act provides that the appeal is by way of rehearing. Accordingly, the appeal is determined by

reference to the material that was before the Committee, the Committee's decision or decisions, and submissions made by or on behalf of the parties. The Tribunal may, on application, give leave to a party to present material (evidence or documents) to the Tribunal that was not provided to the Committee, if it is in the interests of justice that it be considered by the Tribunal.

[10] If a party wishes the Tribunal to consider documents that were not provided to the Committee, the party must apply to the Tribunal for leave to do so. The application must set out the documents the applicant seeks to have admitted, the reason why they were not provided to the Committee and could not reasonably have been provided to the Committee. The applicant must also make submissions as to why it is in the interests of justice that the documents be considered by the Tribunal. In deciding whether it is in the interests of justice to admit further documents, the Tribunal will consider whether the documents are relevant to an issue to be determined on the appeal, and will assist the Tribunal in determining that issue.

[11] The Tribunal may also, if it considers it to be in the interests of justice to do so, give leave for a party to cross-examine another party and/or other persons, based on any information the party and/or other persons provided to the Committee.

#### **Ms Wouters' application for leave to submit further documents**

[12] Ms Wouters states in her application that the documents she seeks to put before the Tribunal are not "new", as they were submitted before the Committee's consideration of her complaint, but have not been included in the Bundle of Documents prepared for the purpose of the appeal ("the Bundle"). Ms Wouters set these out as the Committee case number, emails between herself and the Authority's investigator, and attachments to an email to the investigator.

[13] Ms Garrick acknowledged that some of the documents put before the Committee have been omitted from the Bundle, when they should have been included. However, she submitted that except for those documents, the emails between Ms Wouters and the investigator are not relevant. She described them as relating to procedural matters rather than the substance of the complaint.

[14] The documents referred to by Ms Wouters are not “new”, as they were all available to be (and some were) submitted to the Committee. As such, she was not required to apply for leave to them to be admitted for the appeal. The Tribunal does not accept Ms Garrick’s submission that a distinction should be made between one type of email between Ms Wouters and the investigator and another. Communications between a complainant and the investigator should be put before the Committee.

[15] Accordingly, all of the documents submitted by Ms Wouters should be included in the Bundle.

### **Mr Richardson’s application for leave to submit further documents**

[16] Mr Richardson submitted a bundle of documents in eight categories, indexed as (1) “Bundle of Conceptual Plans with varied configurations”, (2) “Additional evidence Bullock Track”, (3) “Voluntary Surrender of Real Estate Licence”, (4) “Resource Consent Document”, (5) “Public Notified Date of DCC Rezoning”, (6) “DCC Website activated for Public Contribution of rezoning”, (7) “Inconsistent introduction to [the property]”, and (8) “Excerpt from Paterson Pitts RC Application Applicant Comments attributed to Tom Richardson”.

[17] Ms Garrick submitted that the only documents from the eight categories that were before the Committee were three documents contained in the second category. All other documents are, therefore, “new”. Accordingly, Mr Richardson is required to give reasons why the documents were not provided to the Committee and could not reasonably have been provided to the Committee, and make submissions as to why it is in the interests of justice that the new documents be put before the Tribunal.

[18] As a preliminary point, the Tribunal notes that Mr Richardson’s submissions in support of his application for leave to admit further documents are, in large part, evidence in support of his response to Ms Wouters’ complaint (which he could have provided to the Committee), and his submissions on the actual appeal.

[19] Mr Richardson has made submissions as to why documents were not provided to the Committee in respect of categories (1), (2), and (3), only.

[20] The documents included by Mr Richardson in category (1) were all clearly in existence at the time of the transaction, and were available to be presented to the Committee. Mr Richardson has given no reason why they were not. As noted above, the Tribunal's decision must be made on the basis of the evidence that was before the Committee. The Tribunal will not give Mr Richardson leave to present documents that he could have provided to the Committee, but did not. The appeal to the Tribunal is not an opportunity for a party to run the case afresh.<sup>4</sup>

[21] Mr Richardson states that the documents in category (2) were not provided to the Tribunal because "it was not considered relevant at the time. It was not considered that the material was connected to the actions of myself as a Real Estate Agent." If Mr Richardson did not consider these documents to be relevant to the Committee's consideration of the complaint, then they cannot be relevant to the Tribunal's consideration. Further, the Tribunal accepts Ms Garrick's submission that the "Bullock Track" issue is not referred to in Ms Wouters' Notice of Appeal.

[22] The documents in category (3) relate to Mr Richardson's voluntary surrender of his salesperson's licence on 1 March 2016. It is clear from the Committee's decision that it was well aware that Mr Richardson had surrendered his licence.<sup>5</sup> There is no need for the documents in category (3) to be included in the Bundle.

[23] Categories (4), (5), and (6) are simply collections of documents, with no reason given as to why they were not presented to the Committee, or why they should be included in the material before the Tribunal. All are dated before the Committee's consideration of the complaint, and could have been provided to the Committee. The Tribunal repeats its comments in respect of the documents in category (1).

[24] Category (7) comprises, Mr Richardson states, "documents included in the complainants submission". As such, they were considered by the Committee. If Mr

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<sup>4</sup> See *Eichelbaum v Real Estate Agents Authority* (CAC 303) [2016] NZREADT 13, at [55].

<sup>5</sup> See, for example, paragraph 1.2 of the Committee's decision.

Richardson wishes to make submissions concerning these documents, then the proper place to do so is in his submissions on the appeal.

[25] The document in category (8) (which Mr Richardson identifies as an extract from “Paterson Pitt Resource Consent Application Comments”) was clearly in existence at the time of the Committee’s consideration of Ms Wouters’ complaint. Mr Richardson gives no reason as to why it was not provided to the Committee, or why it should be put before the Tribunal. The Tribunal repeats its comments in respect of the documents in category (1).

[26] The Tribunal therefore declines Mr Richardson’s application to admit any of the documents in categories (1) to (8) that were not provided to the Committee and/or (as is the case with the documents in category (2)), are not relevant to the issues to be determined on the appeal.

**Mr Richardson’s application to cross-examine Ms Wouters, Mr Rietveld and “other parties called by Appellant (if any)”**

[27] Mr Richardson has not made any submissions in support of this application, and has not identified any particular person (other than Mr Rietveld) he wishes to cross examine on their statements provided to the Tribunal. No application has been made for any party to give evidence in person to the Tribunal. The Tribunal will have all statements that were provided to the Committee.

[28] The Tribunal can only assume that the matters raised in paragraph 3 of category (7) of the “new documents” are an indication of the matters Mr Richardson wishes to cross-examine on, and reference is made to Ms Wouters, only. To that extent, the Tribunal gives leave for Mr Richardson to cross-examine Ms Wouters, as it may be relevant to an issue to be determined on the appeal.

**Outcome**

[29] The Tribunal does not need to consider Ms Wouters’ application, as the emails between herself and the investigator she refers to were in the possession of the Committee (via the investigator) and should have been included in the Bundle.

[30] The Tribunal declines Mr Richardson's application to admit any of the documents in categories (1) to (8) that were not provided to the Committee and/or (as is the case with the documents in category (2), are not relevant to the issues to be determined on the appeal.

[31] The Tribunal declines Mr Richardson's application for leave for cross-examination, except as is set out in paragraph [28], above.

[32] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews  
Chairperson

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Mr G Denley  
Member

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Ms N Dangen  
Member